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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE RIVAS, Defendant and Appellant.	A152810 (San Francisco County Super. Ct. No. SCN226868)

Appellant Jose Rivas appeals following his conviction on two counts of committing lewd acts on a child. He contends the trial court erred in finding a defense expert was unqualified to testify regarding psychological testing of appellant for "susceptibility to false confession." We conclude the trial court abused its discretion and reverse the judgment.

PROCEDURAL BACKGROUND

In June 2017, the San Francisco County District Attorney filed an amended information charging appellant with two counts of committing a lewd act on a child (Pen. Code, § 288, subd. (a)), with enhancement allegations for substantial sexual conduct (Pen. Code, § 1203.066, subd. (a)(8)).

A jury convicted appellant on both counts but found the substantial sexual conduct allegations not true. In October 2017, the trial court sentenced appellant to five years in state prison, consisting of a three-year term on one count and a consecutive two-year term on the second count.

FACTUAL BACKGROUND

The minor victim (Minor) was born in El Salvador in 2004; appellant is her father. Shortly thereafter, appellant moved to the United States, sponsored by his older sister, Cristabel Rivas. Appellant sent money to Minor and spoke to her on the telephone. In 2014, appellant's mother, Julia Rivas, joined appellant in San Francisco. At the end of 2015, Minor moved to San Francisco to live with appellant and Julia Rivas.

Minor's Statements and Testimony

On October 27, 2016, Minor told a middle school counselor that her father "would try to come into her room every night and rape her." Minor said she would convince him not to touch her by telling him it was wrong because he was her father. The counselor reported the matter to Child Protective Services, appellant was arrested, and a "multidisciplinary" interview of Minor was conducted on October 31. Minor told the interviewer appellant only gave her massages, but she also suggested at one point that appellant might have accidentally touched her private parts.

At the December 19, 2016 preliminary hearing, Minor testified that over the course of a month appellant came into her room at night and touched her vulva, chest, and buttocks. He touched her vulva two or three times. She gave conflicting testimony as to whether he touched her over or under her clothes.

Minor was 13 years old at the time of trial in August 2017. She testified that, sometime after the start of her seventh grade year in 2016, appellant began to come into her bedroom at night and touch her "private parts," meaning her "vulva" and "butt." She testified it happened a "whole bunch of times" or "almost every" night, over the course of about a month. She first testified he touched her over her clothing, then she testified he once touched her under her clothing, and then she testified he twice touched her under her clothing. She first testified appellant "never" touched her chest, and then testified he had done so. Some or all of the times he touched her were during massages; she had asked appellant to give her back massages to help her to fall asleep. Her grandmother was in the living room watching television when the molestation occurred.

Minor testified she was "very nervous" and "scared" when she said during the October 31 interview that she thought appellant touched her by accident.

On cross-examination, Minor admitted she did not get along well with appellant when she first came to live with him. He would not allow her to wear pants and jewelry, and she had to go to church five days a week. For about a month during summer 2016, she lived with her aunt Cristabel Rivas in Antioch. She wanted to continue to live with her aunt because they "did fun things" and "didn't go to church every day." Minor also acknowledged she wanted her mother to come to the United States. When defense counsel asked whether a friend from school had told her she could get immigration papers for herself or her mother by making allegations against appellant, she responded, "I don't know." She testified she did not remember if she asked her aunt whether she could get immigration papers by lying about appellant. She denied lying about appellant for any reason or seeking immigration benefits after reporting the abuse.

Appellant's Police Interrogation

On October 27, 2016, appellant was interrogated by a Spanish speaking officer, Sergeant Esther Gonzales, at a police station. Two other officers were also in the interrogation room. Sergeant Gonzales asked appellant if he knew why he was being interrogated, and appellant answered, "[b]ecause supposedly she . . . told someone I touched her." Appellant said he had only touched her during back massages on her request. The sergeant asked appellant, "do you find your daughter pretty?" He replied, "she's pretty, . . . she's my daughter, right?"

The sergeant pressed appellant, repeatedly accusing him of failing to tell the truth. Appellant asked why the sergeant did not believe him, and she replied that it was because she had spoken to Minor (which was not true). The sergeant subsequently stated, "So tell me exactly what happened? Because it's very different to penetrate her than or to touch her, okay. So, I, I want to know what happened exactly." Appellant responded, "pardon me, what did you say?" The sergeant said, "Penetrating her . . . to touching her is very different." Appellant responded, "Oh, yes, of course," and the sergeant stated, "The things are very different."

Appellant then stated, "No, well, honestly, I'm telling you that, yes, I touched her." He continued, "Because, what am I going to lie for?" In further back and forth, appellant admitted touching her "rear end"—the sergeant used the term "pompis," which is Mexican slang. He also admitted touching Minor's "vagina," "but just one time." The sergeant asked why he did it, and he replied, "as a man there are times you are weak." Appellant said the incidents occurred around 9:30 pm, while his mother was in the living room. He admitted massaging Minor excited him, he had an erection, and he once masturbated while thinking about Minor.

The sergeant directed appellant to write Minor an apology, which stated "I want you to forgive me. Everything that happened I don't want to do any more. And I want you to go far away from me, because you know that we are Christian. And, also, I want no more kisses, no more hugs, and not to get close to me because, honestly, this is embarrassing for me and I don't want this to ever happen again."

Appellant's Testimony

Appellant testified he was born in El Salvador and went to school up to the fourth grade. He was not married to Minor's mother, and he moved to the United States months after Minor's birth on his sister's invitation.

He lived in San Francisco and worked in construction. He called Minor on the phone and sent her money every month. After she joined him in the United States, she complained about the restrictions imposed by appellant's church and twice in early 2016 said she wanted to return to El Salvador. She continued to express that desire after returning from a summer month with appellant's sister in Antioch.

Appellant was arrested by police when he returned from work in the early evening; he had not eaten since noon. At the police station, he was interrogated by Sergeant Gonzales while his arms were handcuffed behind his back. He was nervous and fearful. He observed that, in El Salvador, the police "pretend to be good, but they're not."

Appellant testified his statements that he touched Minor's vagina, rear

end, and breasts were not true. He said he did those and other things because he was afraid of the police. All he ever did was give Minor massages on her back and shoulders at her request. He did not understand what the sergeant meant by the word "pompis," which is not a word used in El Salvador.

Other Defense Witnesses

The defense's expert witness, forensic psychologist Dr. Ricardo Winkel, testified that his psychological testing of appellant disclosed no risk factors for "sexual misconduct or sexual deviance." The testing placed appellant in the lowest risk category for those behaviors. Appellant also measured very low on tests for antisocial personality, sadism, and psychopathy. There was no indication that appellant was lying, exaggerating, or malingering during the tests.

Appellant's older sister Cristabel Rivas testified she came to the United States in 1994. After Minor's arrival in the United States, they spoke every day and saw each other every two or three weeks. Minor wanted to return to El Salvador or live with her aunt in Antioch. Minor twice threatened that if she was not allowed to return to El Salvador or live in Antioch, "I will see what I do." The night appellant was arrested, Minor telephoned Cristabel Rivas and told her that the allegations against appellant were not true. Two days after appellant's arrest, Minor told her aunt that a friend at school had told her that "if she lied against her dad . . . she could get the papers for her mother so that she could come here to the United States."

Appellant's mother, Julia Rivas, testified she and Minor shared a bed and went to bed at the same time. On one occasion she saw appellant giving Minor a backrub. After Minor returned from Antioch, she was rude to appellant and said she wanted to live with her aunt.

DISCUSSION

As explained below, following a pretrial Evidence Code section 402 hearing,[1] the trial court qualified forensic psychologist Dr. Ricardo Winkel to testify as a defense expert regarding his psychological testing of appellant for sexual deviancy, but denied appellant's request for Dr. Winkel to testify regarding psychological testing of appellant for "susceptibility to false confession." We conclude the court abused its discretion in restricting Dr. Winkel's testimony in that respect.[2]

I. *Legal Background*

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (§ 720, subd. (a).) Expert testimony must "relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates." (§ 801.)

" 'Expertise . . . "is relative to the subject," and is not subject to rigid classification according to formal education or certification.' [Citation.] Rather, an expert's qualifications can be established in any number of different ways, including 'a showing

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[1] All undesignated statutory references are to the Evidence Code. Section 402, subdivision (b) provides in relevant part that a "court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury."

[2] Appellant also contends the trial court erred in rejecting a third request that Dr. Winkel be permitted to testify "that false confessions can occur." The trial court did not treat that as a separate request; instead the court described appellant's motion as seeking to have Dr. Winkel testify "as an expert in the two different realms of sexual deviancy and susceptibility to false confession." The occurrence of false confessions has been well established (see, e.g., *In re Elias V.* (2015) 237 Cal.App.4th 568, 577–578), and the possibility of a false confession is implied by the proffered testimony about suggestibility. Nevertheless, testimony about the prevalence of false confessions would require a different body of knowledge than that required to testify to appellant's psychological profile as relevant to the interrogation context. To the extent appellant separately sought to have Dr. Winkel testify that false confessions occur, appellant has not shown the court abused its discretion in denying the request, in light of the absence of specific testimony about Dr. Winkel's familiarity with research on that issue (see Part II and footnote 3, *post*).

that the expert has the requisite knowledge of, or was familiar with, or was involved in, a sufficient number of transactions involving the subject matter of the opinion.' [Citation.] . . . '[t]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth, and no hard and fast rule can be laid down which would be applicable in every circumstance.' [Citations.] [¶] Once this threshold has been met, questions regarding *the degree* of an expert's knowledge go more to the weight of the evidence presented than to its admissibility." (*ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 294.)

"We review the trial court's ruling on the admissibility of expert testimony for abuse of discretion." (*People v. Watson* (2008) 43 Cal.4th 652, 692.) " 'It is . . . elementary . . . that the court will be deemed to have abused its discretion if the witness has disclosed sufficient knowledge of the subject to entitle his opinion to go before the jury.' " (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1319, quoting *Brown v. Colm* (1974) 11 Cal.3d 639, 647–648.)

II. *The Section 402 Hearing and the Trial Court's Ruling*

A. *Appellant's Pretrial Motion*

Appellant filed a pretrial motion to qualify Dr. Winkel to testify regarding his psychological testing of appellant for sexual deviancy and suggestibility in an interrogation setting. Regarding the latter, the motion stated that Dr. Winkel could testify "that certain psychological profiles are more susceptible to suggestion and that persons falsely confess." Appellant emphasized he was *not* seeking testimony "about matters of causation, specifically, whether the interrogation methods used in this case caused [appellant] to confess falsely."

Dr. Winkel's report regarding appellant's psychological evaluation was attached to the motion. The report indicated that Dr. Winkel was a bilingual English/Spanish speaker and that the evaluation had been conducted in Spanish. One of the psychological tests administered was the Gudjonsson Suggestibility Scales (GSS), described as a test "specifically developed to assess the degree to which a defendant in a

criminal investigation is vulnerable to succumbing to interrogatory pressure, modify his responses and align them with those he perceives that investigators want to obtain from him." The report observed that appellant's "poor performance on this test is consistent with high susceptibility to interrogatory pressure and with offering false statements under stressful conditions." The report described appellant as "a compliant person with an attitude of suspicion and wariness toward authority figures that is partly driven by sociocultural variables. He is eager to please, easy to manipulate and highly susceptible to offering false statements under interrogatory pressure during a custodial interrogation."

In discussions with the trial court before the section 402 hearing, appellant's counsel acknowledged that "Dr. Winkel is not an expert on police interrogation techniques," but he said the doctor would not testify about police "techniques" or "what the police did or did not do." Instead, Dr. Winkel would testify about the results of a standardized psychological test that measured a person's suggestibility to making a false confession. Appellant's counsel commented, "This is an issue about [appellant] and his psychological profile." The prosecutor argued Dr. Winkel was not qualified to testify regarding the suggestibility testing because he lacked expertise regarding the pressures that exist during a custodial interrogation. The prosecutor also argued the doctor was not qualified to testify regarding the prevalence of false confessions.

B. *Dr. Winkel's Testimony at the Section 402 Hearing*

At the section 402 hearing, Dr. Winkel testified he has a Ph.D. in clinical psychology, has been licensed in California for 25 years, and has over 20 years of training in forensic psychology. A few times a year he attends workshops put on by the American Academy of Forensic Psychology and the Society for Personality Assessment. In his forensic psychology practice, he administers a range of standardized psychological tests. He explained that " 'Standardization' refers to a process through which a test is run through a number of pilot studies in order to establish a number of important statistical properties. The most common ones are reliability and validity." One of Dr. Winkel's areas of assessment specialization is suggestibility and false confessions.

Dr. Winkel testified the research on suggestibility and false confessions "started full-force about two decades ago . . . in part as a consequence of the DNA Project," which found that "a significant proportion of people that turned out to not have committed the alleged offenses had confessed." The doctor "started becoming interested in the subject soon after that . . . say 15, 16 years ago." He "attended conferences, read[] quite a bit, and [attended] workshops, and eventually start[ed] using the one test that was specifically designed for" measuring suggestibility in an interrogation setting. That GSS test assesses "the personality of the person who is the suspect or is being interrogated," and "measures the degree to which a particular person is susceptible to yielding to pressure and to changing statements." The test does not involve assessment of interrogation techniques. The GSS is peer-reviewed, standardized, and generally accepted in the forensic psychology professional community. Dr. Winkel learned about the GSS through workshops, through his review of the research, and through consultation with the researcher who developed the test and another researcher. He was familiar with the GSS "manual," which was "a compilation of all the relevant research on the subject." He had "incorporated . . . all the research background . . . described in the manual" and was "more involved in the development and application of [the GSS] test than . . . other tests."

In the "last few years" Dr. Winkel conducted "a few dozen" GSS tests. He provided expert testimony about the GSS in California courts "a few dozen times." In the present case, he spent 4 to 5 hours conducting a clinical interview and administering tests. The doctor is a native Spanish speaker and he administered the tests in Spanish.[3]

Dr. Winkel testified that he had viewed video recordings of over 100 police interrogations, that he had listened to audio recordings of 100 to 200 other interrogations, and that he was familiar with a police interrogation training manual. He acknowledged

[3] Dr. Winkel also testified about his "very similar" background relevant to sexual deviancy testing, which is not at issue on appeal. The doctor testified no "formal education" exists in "the area of false confession." He testified he had read books and attended workshops on false confessions, but it is unclear whether those related to suggestibility, as distinguished from the prevalence of false confessions.

he had not participated in any interrogations or scientific studies about interrogation techniques.

C. *Argument and the Trial Court's Ruling*

Following Dr. Winkel's testimony, appellant's counsel argued the doctor was qualified to testify as an expert "that there are personality types that are more suggestible" and that the GSS test demonstrated appellant was such a person. Appellant's counsel emphasized the defense was not seeking to have Dr. Winkel testify about police interrogation techniques, which counsel described as a different area of expertise.

The prosecutor did not object to Dr. Winkel testifying regarding the sexual deviancy testing, but the prosecutor argued the doctor was not qualified to testify as an expert on suggestibility testing because he did not demonstrate sufficient knowledge about police interrogation techniques. The prosecutor argued, "So while he can and may even be qualified in some settings to conduct a [GSS] test, he is not qualified to interpret that when he knows not enough about the police interrogation that was had in this case . . . ." The prosecutor also argued that Dr. Winkel "never participated in a single study or authored any publication on this issue. He has only reviewed the interrogations that he's reviewed as part of cases he's worked when being paid to work them."

The trial court qualified Dr. Winkel to testify regarding the sexual deviancy testing, but stated the following regarding the suggestibility testing: "Having reviewed the authorities on the issue, there are two different issues that I am dealing with here: [¶] One, is whether simply the subject of the suggestibility and false confession is an arena and an area that would be beyond common the jury's common experience, and whether it is allowable to have expert testimony in that arena. [¶] And I am persuaded by the *Elias*[4] case and the *Page*[5] case, among others, that it is a subject area that, in the appropriate case, would allow for expert testimony. [¶] But the second issue that I have to address is whether this is the individual who can address that issue. [¶] And having heard Dr.

[4] *In re Elias V.*, *supra*, 237 Cal.App.4th 568.
[5] *People v. Page* (1991) 2 Cal.App.4th 161 (*Page*).

Winkel's testimony, I do not find that he is qualified as an expert in this field of suggestibility and false confession . . . in the very limited arena of study that he's had. [¶] And it included reading a manual and attending four to five workshops. No study, other than the cases that he's been involved in on this issue. [¶] And the Court is not persuaded that he has enough background and expertise in the issue area of suggestibility and false confession to allow him to testify as an expert in it. [¶] . . . [¶] And in that respect, then, I would not allow testimony with regard to the administration of the [GSS] test . . . ."

III. *The Trial Court Abused Its Discretion*

At the outset, we observe that the trial court concluded the proposed testimony about suggestibility to false confession was an appropriate area for expert testimony. Implicit in that conclusion was a finding that the proposed testimony was relevant to the issues on trial and that it "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (§ 801, subd. (a); see also *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 753 (*Sotelo-Urena*).)

The question on appeal, then, is whether the trial court abused its discretion in finding that Dr. Winkel lacks "knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (§ 720, subd. (a).) The trial court's decision appears to reflect views the court expressed during discussions prior to the section 402 hearing. At that time, the court said it agreed it was appropriate to allow "testimony on the issue of whether or not someone is particularly susceptible to a false confession," but the court observed that the expert involved in *Page*, *supra*, 2 Cal.App.4th 161, "had considerable experience, [was a] real expert[] in the fields involved." The trial court contrasted the expert in *Page* to Dr. Winkel stating, "A question that I would have is whether somebody who is a practicing psychologist, whether that, in and of itself, would be sufficient to allow him to testify as an expert in these arenas."

The *Page* decision does not support the trial court's ruling.[6] In *Page*, the defense presented the testimony of a professor of psychology, who testified "concerning factors which can lead a person to give an inaccurate statement in an interrogation setting." (*Page*, *supra*, 2 Cal.App.4th at p. 179.) The trial court there did not permit the expert "to specifically relate these principles to [the defendant's] statements, or to give his opinion concerning the reliability of the confession." (*Ibid.*) The court of appeal held that the trial court did not abuse its discretion in prohibiting the expert from giving "his opinion regarding the overall reliability of the confession." (*Id.* at p. 188.)

The testimony admitted in *Page* was analogous to that appellant sought to admit in the present case, although the testimony there was focused on interrogation tactics rather than suggestibility testing. (*Page*, *supra*, 2 Cal.App.4th at pp. 180–182.) The expert in *Page* was a professor with "extensive credentials as a social psychologist" and a long list of publications, but the decision does not state that the expert had conducted research or published on the subject of suggestibility, police interrogations, or false confessions. (*Id.* at p. 180 & fn. 9.) More fundamentally, although the expert in *Page* was a professor and Dr. Winkel is not, there is no requirement that a witness must be a researcher or nationally recognized authority to testify as an expert on a given subject. To the contrary, "Where an expert is asked to interpret studies or research in a particular field, it is not necessary that the expert has personally conducted similar studies or research." (*People v. Vu* (1991) 227 Cal.App.3d 810, 814.) As detailed above, Dr. Winkel's section 402 testimony described his two decades of experience administering and interpreting psychological tests, his particular interest and involvement with the GSS, and his experience testifying as an expert about the test in a few dozen cases. The record simply does not support the trial court's assertion that his experience was limited to "reading a manual and attending four to five workshops." The degree of the doctor's expertise went to the weight of his testimony. (*People v. Eubanks* (2011) 53 Cal.4th 110, 140 (*Eubanks*)

[6] The trial court also cited *In re Elias V.*, *supra*, 237 Cal.App.4th 568, but that case did not involve expert testimony. The apparent relevance of that case is its acknowledgement that "The danger of false confessions is real." (*Id.* at p. 577.)

[“ ‘ “ ‘Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility.’ ” ’ ”].) Notably, Dr. Winkel did not testify he is a published researcher on sexual deviancy testing, but the trial court permitted him to testify as an expert on the subject.

The other apparent basis for the trial court’s ruling was a belief that Dr. Winkel was required to demonstrate an expertise in police interrogation techniques to testify regarding appellant’s suggestibility as it relates to the interrogation context. However, Dr. Winkel testified the GSS was a standardized, generally-accepted, peer-reviewed test that measured suggestibility based on the psychological characteristics of the subject without reference to the particular interrogation techniques employed. Neither the trial court nor respondent on appeal explained how a psychologist’s ability to interpret the results of the test depends on an expertise in police interrogation tactics. (See *Varas v. Barco Mfg. Co.* (1962) 205 Cal.App.2d 246, 260 [abuse of discretion where “evidence otherwise admissible is rejected only because the witness does not possess knowledge of a matter which is not in fact a prerequisite to the attainment of competency as an expert with respect to the particular subject matter”].) Dr. Winkel’s section 402 testimony demonstrated that the administration and interpretation of psychological tests, including the sexual deviancy test and the GSS, was precisely his area of expertise. (See *People v. Stoll* (1989) 49 Cal.3d 1136, 1154 (*Stoll*) [“California courts have deferred to a qualified expert’s decision to rely on ‘standardized’ psychological tests . . . to reach an opinion on mental state at the time acts were committed”].)

In any event, to the extent some knowledge of police interrogation techniques was required, Dr. Winkel demonstrated that knowledge through his testimony that he had viewed or listened to recordings of 200 to 300 interrogations and familiarized himself with an interrogation training manual. Any gaps in his knowledge of interrogation techniques went to the weight of his testimony, not its admissibility. (*Eubanks*, *supra*, 53 Cal.4th at p. 140.) It was also a matter properly explored on cross-examination. (*Stoll, supra*, 49 Cal.3d at p. 1159 [“issues of test reliability and validity may be thoroughly

explored on cross-examination at trial. . . . The prosecution also may call, in rebuttal, another expert of comparable background to challenge defense expert methods."].)

On appeal, respondent makes only a half-hearted attempt to justify the trial court's finding that Dr. Winkel was unqualified to testify regarding the GSS test. Respondent makes the argument, rejected above, that Dr. Winkel "never participated in or authored a single study on false confessions or suggestibility." Respondent asserts that Dr. Winkel "could not identify 'a single article or [study] conducted in the area of suggestibility scales.' " In fact, the doctor testified he was familiar with the whole body of research in the GSS manual and named four specific researchers whose work he was familiar with, but he said he did not "want to risk giving . . . a misleading name or date" for a specific article. Finally, respondent argues Dr. Winkel never "participated in a police interrogation," without explaining why that experience is a pre-requisite to the proffered testimony.

Further, the cases cited by respondent do not support the trial court's ruling. In *People v. DeHoyos* (2013) 57 Cal.4th 79, the Supreme Court held the trial court did not err in excluding expert testimony "concerning how some people may be so affected by being fired that they commit homicide." (*Id.* at p. 128.) The trial court "appropriately allowed [the expert] to testify to matters within the scope of her qualifications as a *clinical* psychologist who had performed a psychological evaluation of defendant." (*Id.* at pp. 128–129.) But the expert was properly prohibited from "generalizing about how job loss may cause someone to commit a homicide" because "there was an absence of research studies in this area." (*Id.* at p. 129.) The court noted that the expert had not conducted her own research, but the court did not suggest she could not have testified based on research conducted by others. (*Ibid.*) The fundamental obstacle was "that expert opinion concerning this topic may not have been possible under the then current state of research." (*Ibid.*) In the present case, the trial court did *not* permit Dr. Winkel to testify in his capacity as a clinical psychologist administering the GSS, and neither the trial court nor respondent suggested there was insufficient research to support the proffered testimony about the GSS.

In the other case cited by respondent, *People v. Castaneda* (2011) 51 Cal.4th 1292, the trial court did not permit a "professor of psychiatry and biobehavioral sciences" to testify "concerning a genetic basis for [the] defendant's drug and alcohol problems." (*Id.* at pp. 1336–1337.) The Supreme Court affirmed because the expert's testimony "reflect[ed] that he was trained as a social worker to collect information concerning family substance abuse, but it [did] not establish that he was qualified to testify concerning the genetic basis of a family's history." (*Id.* at p. 1337.) Also, the expert did not testify to any familiarity with research that supported the proffered testimony. (*Id.* at p. 1338.) Here, Dr. Winkel's testimony established his qualifications to administer and interpret the GSS, as well as his familiarity with the research underlying the test.

Because Dr. Winkel " 'disclosed sufficient knowledge of the subject of' " suggestibility to false confessions " 'to entitle his opinion to go before the jury,' " the trial court abused its discretion in prohibiting him from testifying on that subject. (*Chavez*, *supra*, 207 Cal.App.4th at p. 1319.)

IV. *The Error Was Not Harmless*

The main thrust of respondent's argument on appeal is that any error in limiting Dr. Winkel's testimony was harmless. The proper standard of review is whether it is reasonably probable that appellant would have obtained a more favorable result in the absence of the trial court's error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; accord *Sotelo-Urena*, *supra*, 4 Cal.App.5th at p. 756.)[7]

Respondent argues first that "even if the court had found the doctor qualified to testify as an expert, it may well have excluded or limited such testimony as irrelevant, time-consuming, confusing, or substantially more prejudicial than probative." However,

[7] We reject appellant's contention that the trial court's ruling deprived him of his constitutional right to present a complete defense and, thus, we must reverse unless the error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) "[T]he routine application of provisions of the state Evidence Code law does not implicate a criminal defendant's constitutional rights." (*People v. Jones* (2013) 57 Cal.4th 899, 957.) This is so because "only evidentiary error amounting to a complete preclusion of a defense violates a defendant's federal constitutional right to present a defense." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1104, fn. 4.)

respondent points to nothing in the record indicating that the trial court would have done so. Respondent's unsupported speculation that the court would have exercised its discretion in that manner cannot support a conclusion that the court's error was harmless. (See *People v. Miller* (1983) 33 Cal.3d 545, 552 [" 'Because we cannot measure the prejudice suffered by defendant without engaging in impermissible speculation, he is entitled to be restored to the position he would have enjoyed had the court properly ruled on the motion in the first instance.' "].)

Second, respondent emphasizes that appellant testified about the pressures placed upon him during the interrogation and appellant's counsel argued to the jury that appellant falsely confessed because he was suggestible and easily led. For example, in his opening statement appellant's counsel argued appellant had never been interrogated by police before, and, "[b]ased on his cultural background," appellant "very naively" thought "that the best course of action was the path of least resistance." In his closing argument he said, "[Appellant] was nervous and scared when he was being interrogated by Sergeant Gonzale[s]. He was handcuffed behind his back." Counsel argued that, in the interrogation, appellant "acquiesced, he complied, as you saw by his cross examination, when he was under cross examination at this trial, [he was] somewhat easily led." However, we cannot conclude the excluded expert testimony was superfluous. "[A] lawyer's argument standing alone is not an adequate substitute for a similar argument based on factual testimony by an established expert explaining to the jury the results of professional research. It is that testimony which would allow counsel to make a forceful argument applying the testimony to the facts of the case." (*People v. Vu*, *supra*, 227 Cal.App.3d at p. 814; see also *Sotelo-Urena*, *supra*, 4 Cal.App.5th at p. 752.)

Finally, respondent argues that "the evidence that the confession was false was weak, and the evidence of appellant's guilt was strong, such that there is no reasonable probability of a different outcome had Dr. Winkel been permitted to testify as an expert on false confessions and suggestibility." We agree it is difficult to convince a jury a confession is false in the absence of clearly coercive police tactics. However, the trial court's ruling prevented appellant from offering the jury a psychological framework

explaining why he was the type of person prone to make a false confession. (See *Sotelo-Urena*, *supra*, 4 Cal.App.5th at p. 752 [expert's testimony "may have bolstered defendant's credibility by providing a context within which the jury could assess defendant's claims"].) The prejudicial impact of the court's ruling was amplified when the prosecutor attempted to undermine Dr. Winkel's testimony about the sexual deviancy testing by suggesting on cross-examination that the results were inconsistent with appellant's confession; Dr. Winkel was not permitted to respond by explaining about the suggestibility testing. The prosecutor even emphasized in his closing that appellant had offered "no intelligible credible explanation for why he would" confess. As appellant argues, the excluded expert testimony "would have offered an alternative, expert-based explanation for why [appellant] may have 'confessed' to things that he did not do." And, critically, the other evidence in the case was *not* overwhelming: there were many conflicts in Minor's various accounts, and appellant's sister's testimony suggested Minor may have invented the allegations in order to obtain some immigration benefit for herself and her mother. It is reasonably probable the excluded testimony would have created reasonable doubt as to appellant's guilt.[8]

DISPOSITION

The judgment is reversed.

[8] We disagree that Minor's testimony meaningfully corroborated appellant's confession. Both the confession and Minor's various statements were fractured and vague. The circumstance that appellant's description of the timing and location of the massages corresponded to Minor's testimony is not meaningful, because he never denied giving her massages and Minor acknowledged she requested massages.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A152810)